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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. CLARENCE J. ESTEEN, Defendant and Appellant.	A131365 (Alameda County Super. Ct. No. 162197)

Defendant Clarence J. Esteen appeals his convictions of robbery and assault with a firearm. He contends the trial court committed prejudicial error when it sustained an objection to a question posed by his attorney to his eyewitness identification expert. We find no error and affirm.

PROCEDURAL HISTORY

On November 16, 2009, an information was filed charging defendant with second degree robbery (Pen. Code, § 211)[1] and assault with a firearm (§ 245, subd. (a)(2)). The information further alleged as to both counts various firearm and great bodily injury enhancements (§§ 12022.5, subd. (a), 12022.53, subds. (b)–(d) & (g), 12022.7, subd. (a)), and, as to the robbery, that the victim was over the age of 65 (§ 667.9, subd. (a)).

On October 26, 2010, a jury found defendant guilty as charged and, except for the age-based enhancement allegation, found the enhancement allegations true.

[1] All further undesignated statutory references are to the Penal Code.

On February 25, 2011, the trial court sentenced defendant to an aggregate term of 30 years to life. This appeal followed.

EVIDENCE PRESENTED AT TRIAL

I. The Prosecution's Case

A. Adele Schenker

Adele Schenker testified that she was employed by AC Transit when the incident occurred. Her job was located at 1600 Franklin Street in Oakland. She worked from 7 a.m. to 3 p.m., and took the bus to and from work. On days with nice weather, she would get some exercise after work by walking to the bus stop at 34th Street and Martin Luther King Jr. Way. The walk is 1.28 miles long and would take her about a half hour.

On June 17, 2009, Schenker decided to walk to the 34th Street bus stop after she got off work. She was 66 years old at the time. The weather was sunny that day. She began by crossing 17th Street to walk along Telegraph Avenue. She later turned on 30th Street to get to Martin Luther King Jr. Way. She was carrying a cloth shopping bag on her shoulder that had her purse inside. As she walked along 30th street, she saw some workmen under the freeway overpass. She also noticed defendant standing on the corner, and saw two men and a woman crossing the street. Defendant appeared to be holding some money between his fingers. He was wearing yellow and white clothing, including a shirt, long shorts, and a baseball cap. When she first saw him, he was about 10 feet away.

As Schenker was crossing the street to the opposite corner, she heard defendant say something that she thought was a greeting. She turned around and said "hi," and looked at him. She turned back and continued to walk along Martin Luther King Jr. Way in the direction of 34th Street. As she approached 31st Street, she stepped toward the curb and turned back to see if a bus was coming. She saw defendant about six or seven feet behind her and he also turned to look down the street. She did not think anything of it because he could have been looking for the bus as well.

Schenker crossed 31st Street and made it past the first house on the corner when defendant stepped out of a driveway and told her to give him her bag. He was within

arm's length and she noticed he had a thin beard on his jaw line. He pulled back his shirt and showed her a gun in the belt of his pants. He grabbed the bag and pulled it and she reacted by holding on to the bag and pulling it towards her body. She screamed for help. He let go of the bag and she fell over the curb and into the gutter of the street. She curled up in a fetal-like position and covered her head with her right arm to protect herself. The bag was under her body.

Schenker was still screaming for help when she was shot in the back of her right shoulder. Right after that, the bag was pulled out from under her body. She continued to lie in the street until the police came. She was in a lot of pain but did not lose consciousness. The paramedics came quickly and took her to the hospital. There was no exit wound. After a full body scan, the bullet was located on the left side of her chest. The bullet was removed about nine days later. Her right upper arm was broken and she underwent surgery in which a plate or rod attached with screws was used to repair the break.

After the incident, Schenker was contacted by a police officer who asked if she could identify the perpetrator. The officer came to her home and showed her a six-photo line up. She was able to immediately identify defendant as the perpetrator.

B. Anthony McMillan

Anthony McMillan testified that he lives near 32nd Street and West Street. He has no vision in his left eye, but he has "hundred" vision in his right eye. He wears glasses to protect the left eye but can see with his right eye without his glasses. He is very familiar with the area at 31st Street and Martin Luther King Jr. Way because he has lived in the area for about 17 years.

On the day of the incident, McMillan was driving his vehicle on Martin Luther King Jr. Way between 30th and 31st Streets. There was no other traffic on the street. He heard a female voice calling for help. The voice came from his left side and he looked in that direction. He saw a white-haired elderly lady with her arm stretched out hanging on to her purse. He saw someone trying to take her purse from her. He recognized this person as someone from his neighborhood. He did not know the person's name, but he

had seen him in the area 30 to 50 times before. The person was wearing a yellow shirt. At trial, McMillan identified the person as defendant.

McMillan decided to pull his truck over and stop defendant from taking the woman's purse. As soon as he pulled to the curb, he saw defendant take a gun from his waistband. Defendant yanked at the purse one more time and then he shot at the woman twice. After he shot her, he took the purse and ran. McMillan drove down the street about 100 yards so that he would not be spotted and called 911. After the police arrived, he approached an officer and told him that he had seen everything. Subsequently, he gave the police a statement. Some days later, he was asked to look at a photographic lineup. He was able to identify defendant out of the six photos that he was shown.

C. Officer Mark Thomas

Oakland police officer Mark Thomas spoke to Schenker and McMillan a few days after the incident. McMillan told Thomas that he was familiar with the suspect but did not know his real name. He told Thomas that he thought the suspect went by the name of "Dooby." Thomas put out a bulletin with the suspect's general description, including the possible nickname. The next day, an officer contacted Thomas and said that he knew someone from the area who went by the name of "Booby." He gave Thomas defendant's true name and an address. Thomas pulled defendant's photo from the computer and made a six-pack photo lineup. He later met separately with Schenker and McMillan to show them the lineup. Before he showed them the lineup he read a standard admonishment which, among other things, advises that the perpetrator might not be included and that they were not obligated to identify anyone. Schenker and McMillan both identified defendant as the perpetrator. Defendant was arrested shortly thereafter.

II. Defendant's Case

Dr. Robert Shomer, an expert witness in the area of eyewitness identification, testified for defendant. Shomer told the jury that there is a large body of scientific research regarding eyewitness identification. There is not much disagreement about the major findings in this area. The United States Department of Justice has based its training manuals on this research, and other jurisdictions have changed their

identification procedures based on studies addressing the accuracy of eyewitness identifications.

Shomer testified that even under the best of circumstances, eyewitness identification is accurate only 50 percent of the time. Some factors that affect accuracy include the passage of time, high stress viewing conditions, and the fact that many people do resemble each other. Lighting, distance, duration, and visual capacity of the observer are also necessary factors. But even good lighting will not guarantee accurate identification after a crime has occurred because the victim will have been focused on self-preservation, and not on taking in the details of the perpetrator's face for later identification. If the witness and the suspect are of different races, there is at least a 12 to 15 percent decrease in accuracy. Accuracy is also decreased if the subject is wearing a hat, because the hat will obscure the view of the head, hair, and hairline, leaving less detail upon which to identify someone. Also, if the subject has a weapon, the witness will tend to focus more on the weapon and less on the face. Additionally, if multiple individuals are present at the scene a witness can become confused and mistake one person for another.

Shomer also described factors that make for a fair test of witness identification, including double blind identification procedures, showing photos sequentially to avoid comparison, using photographs of similar composition, and recording the viewing session.

DISCUSSION

During the questioning of Shomer, defendant's counsel attempted to ask him the following question: "Has the United States Department of Justice found a large number of individuals who have been convicted primarily on the basis of eyewitness identifications that were later found to be wrong?" The prosecutor objected based on relevance. The trial court sustained the objection, stating: "Because we don't know all the details of those cases, under [Evidence Code] 352 I'm going to exclude any questions or testimony about that. CALCRIM [No.] 315, which is what the jurors will be given regarding eyewitness testimony, goes through all the various factors that they're to

consider in evaluating identification testimony. Without knowing in each of those cases all these factors, I think it's more prejudicial than probative."

Defendant contends there was no basis for a relevance objection because the question was intended to show "simply that eyewitness identification can with a substantial degree of frequency be erroneous and such error is not just some rarity elaborated on by a well-paid defense witness who purports to be an expert on the subject." He claims the trial court abused its discretion by preventing Shomer from answering the proffered question. We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 725.)

I. Eyewitness Identification

The dangers of eyewitness identifications have led courts to allow expert witnesses to address the many factors that can play a role in affecting an individual's perception. (See *People v. McDonald* (1984) 37 Cal.3d 351, 375–376 (*McDonald*), overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.) Some of these factors. such as stress, the focus on the gun, and a difference in race of the observer and the observed, are especially pertinent to the instant case. (*McDonald, supra,* at p. 361.) We assume a qualified expert witness can testify concerning psychological factors that can impair the accuracy of an eyewitness identification, and can refer to supporting experimental studies. (See *id.* at pp. 366–367.) The trial court did not exclude such testimony here.

The trial court did not preclude Shomer from testifying about the major findings in the field of eyewitness identification. Shomer testified at length about the major research findings in response to counsel's questions. Specifically, he testified that to have a valid identification there must be a fair test; erroneous identifications result when a witness identifies the person in a photographic lineup who most resembles but is not the suspect; seeing something in the midst of a stressful life situation creates more inaccuracy; where a weapon is involved a witness is more likely to focus on the weapon than the person holding the weapon; cross-race identifications are less accurate; and stress overwhelms the processes needed for accuracy.

II. The Challenged Question Called for Hearsay

Defendant's counsel's question did not pertain to the effect of a psychological factor on eyewitness testimony as it did not relate to how perception is affected by psychological factors, memory, or retrieval. Instead, the question sought to elicit statements made by the United States Department of Justice to the effect that there was "a large number of individuals who have been convicted primarily on the basis of eyewitness identifications that were later found to be wrong." As the People correctly argue, the question called for hearsay, i.e., "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Defendant admits as much in his opening brief: "[T]he probative value [of the proffered evidence] went towards whether Dr. Shomer was simply the defense's hired gun offering up speculative factors having rare application or *whether there actually were a substantial number of wrongful convictions due to erroneous eyewitness testimony*." (Italics added.) Clearly, the testimony was sought for its truth.[2]

On direct examination, an expert may give the reasons for an opinion, including the materials the expert considered in forming the opinion, but an expert may not under the guise of stating reasons for an opinion bring before the jury incompetent hearsay evidence. (*People v. Coleman* (1985) 38 Cal.3d 69, 92.) A trial court has considerable discretion to control the form in which the expert is questioned to prevent the jury from learning of incompetent hearsay. (*Ibid*.) Here, defense counsel did not offer that Shomer had based any of his opinions on the Department of Justice's findings. Instead, counsel attempted to introduce, as a fact, the conclusions contained in the report itself, namely,

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[2] That the trial court did not rely on the hearsay rule in sustaining the objection is immaterial: " 'No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' [Citation.]" (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.)

that a large number of defendants have been wrongfully convicted based on faulty eyewitness testimony. This evidence was inadmissible hearsay.

III. The Trial Court Did Not Err in Sustaining the Relevancy Objection

Alternatively, we find the trial court's ruling on the relevancy objection was reasonable and within the court's discretion. Evidence Code section 352 authorizes the exclusion of evidence if its admission will create "substantial danger . . . of misleading the jury." (See *People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10.) Here, the evidence of the Department of Justice's study was apparently offered so that the jury would infer that the eyewitnesses in this case could have been wrong because eyewitnesses in other cases have been wrong. As the trial court noted, this evidence was not relevant to the facts of the present case because the details involved in those other cases were unknown. The evidence thus would have detracted from the specific circumstances surrounding the witnesses' identification of defendant in this case, creating the danger of misleading the jury as to their reliability.

IV. Prejudice is Not Shown

Even assuming the trial court improperly limited Dr. Shomer's testimony, defendant does not show prejudice. Trial court errors involving the exclusion of evidence, including the erroneous exclusion of proffered expert witness testimony, are generally governed by the *Watson* standard, namely, whether it is reasonably probable that a result more favorable to defendant would have been achieved in the absence of the error.[3] (See *People v. Watson* (1956) 46 Cal.2d 818, 836; *McDonald, supra,* 37 Cal.3d 351, 376; *People v. McNeal* (2009) 46 Cal.4th 1183, 1203 [" 'As a general matter, the

[3] We reject defendant's contention that the limitation on Dr. Shomer's testimony deprived him of his state and federal constitutional rights to present a defense. The court did not exclude Dr. Shomer's testimony or limit it in such a way that effectively excluded it. Defendant explored his defense of incorrect eyewitness identifications extensively through Dr. Shomer's testimony, through his cross-examination of the eyewitnesses, and through his argument to the jury. Erroneous evidentiary rulings can in a particular case in combination rise to a level of a due process violation. (*Montana v. Egelhoff* (1996) 518 U.S. 37, 53.) But a defendant is not denied his right to present a defense "whenever 'critical evidence' favorable to him is excluded . . . ." (*Ibid.*) Accordingly, the application of the rules of evidence does not violate a defendant's right to present a defense, and although the "complete exclusion" of evidence establishing a defense could theoretically rise to the level of a constitutional violation, the exclusion of defense evidence on a minor point does not. (*People v. Cunningham* (2001) 25 Cal.4th 926, 998–999.)

"[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense." [Citations.]' [Citation.] Because the trial court merely rejected some evidence concerning a defense, and did not preclude defendant from presenting a defense, any error is one of state law and is properly reviewed under *People v. Watson* . . . ."]; *People v. Stoll* (1989) 49 Cal.3d 1136, 1163 [reviewing exclusion of expert testimony under *Watson* standard].)

Here, both Schenker and McMillan reliably identified defendant as the perpetrator. The crime itself occurred in broad daylight. Schenker had observed defendant on the street corner and had acknowledged him with a greeting before he confronted her. She also saw his face as he demanded her bag. McMillan had seen defendant in the area on numerous prior occasions and on the day of the incident was able to provide police with a name similar to defendant's nickname. While he had vision in only one eye, there was nothing to suggest his view of defendant was impeded during the incident. Further, both witnesses readily identified defendant when presented with the six-pack photographic lineup, and both also identified him at trial.

Additionally, all of the factors defendant stresses as a demonstration of the weakness of the eyewitness testimony in this case were factors included in Dr. Shomer's testimony and presented to the jury for its consideration, including his assertion that at best the probability of accuracy was 50 percent, and that a variety of factors (which the jury knew to be present) could adversely affect reliability, including the cross-racial effect, stress, and weapon focus. Further, the jury was properly instructed with CALCRIM No. 315 as to the factors to consider in evaluating eyewitness testimony. It is not reasonably probable defendant would have obtained a more favorable result had the jury also learned that the Department of Justice had found a large number of wrongful convictions had resulted from faulty eyewitness identifications made in entirely unrelated cases.

DISPOSITION

The judgment is affirmed.

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Dondero, J.

We concur:

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Marchiano, P. J.

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Margulies, J.